1989

Nupetco Associates, a Utah Limited Partnership v. Leland A. Martineau, Charles Water, magic Valley moters, Inc., and Magic Valley Properties, a partnership : Reply Brief

Utah Court of Appeals

John C. Green; Kim M. Luhn; Gustin, Green, Stegall & Liapis; Attorneys for Appellant.
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UTAH COURT OF APPEALS

NUPETCO ASSOCIATES, a Utah Limited Partnership,	:	Case No. 890474-CA
Plaintiff-Respondent.	:	District Court No. C83-5680
v.	:	
LELAND A. MARTINEAU, CHARLES WATER, MAGIC VALLEY MOTORS, INC., and MAGIC VALLEY PROPERTIES, a partnership,	:	Category No. 14b
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT LELAND A. MARTINEAU

APPEAL FROM SUMMARY JUDGMENT IN FAVOR OF NUPETCO ASSOCIATES IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, HONORABLE SCOTT DANIELS

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COMPLETE LIST OF ALL PARTIES
TO THE THIRD JUDICIAL DISTRICT COURT ACTION

MICHAEL W. STRAND and MLK INVESTMENTS, a Partnership, NUPETCO ASSOCIATES, a Utah Limited Partnership,	Case No. 890474-CA
Plaintiff-Respondent.	District Court No. C83-5680
v.	
LELAND A. MARTINEAU, CHARLES WATER, MAGIC VALLEY MOTORS, INC., and MAGIC VALLEY PROPERTIES, a partnership,	Category No. 14b
Defendant-Appellant.	

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RULES

Defendant-Appellant Martineau respectfully submits this Reply Brief in response to the Brief of Nupetco Associates.

SUPPLEMENTAL STATEMENTS OF FACTS

1. The debt which is the subject matter of this action was a loan to the defendant Magic Valley Properties, an Idaho partnership. (R. 200). However, at no time was Magic Valley Properties served with a summons and complaint in this matter. Instead, the only defendant before the court always has been and continues to be defendant Leland Martineau. (R. 173).

2. The offsets and counterclaims of defendant Leland Martineau consisted not only of accounting services rendered to Michael Strand, his associated entities, and Magic Valley Properties, but also for cash invested by Lee Martineau as a partner. (R. 421). It is Lee Martineau's position that Michael Strand is a partner and one-half owner of Magic Valley Properties, and should therefore, reimburse Leland Martineau for one-half of the amount of cash invested (R. 421).

ARGUMENT

I

LELAND MARTINEAU DID NOT STIPULATE TO A PERSONAL JUDGMENT

In its brief the plaintiff repeatedly makes the factual assertion and legal conclusion that Leland Martineau stipulated to personal judgment being entered against him, and that the subsequent order is equivalent to a money judgment. Neither is supported by the record, and the defendant vehemently disputes

both. This issue is at the core of this appeal and cannot be resolved by a mere recitation couched in the tone of a self-evident truth.

The first mention of the stipulation in the record is found in the transcript of the hearing on the Motion to Dismiss dated September 3, 1985 (Tr. beg. at R. 154). The applicable discussion begins at line 18 on page 12.

> MR. CAINE: Secondly, I think in a situation we have in this case that there was an attempt to foreclose on the mortgage, and if -- if counsel for Mr. Martineau is now saying in this proceeding and are willing to stipulate that, in fact, there is a $327,000 debt, that's evidence -- even though there's not a promissory note, there is a debt that is secured by that note -- or secured by that mortgage, excuse me, and willing to stipulate to that, that's fine. We'll stop right now and go to Idaho.
>
> MR. KIPP: We accept it.
>
> THE COURT: All right. That settles the case.
>
> MR. CAINE: You stipulate that that is secured by that property?
>
> MR. KIPP: We accept it. We accept that proffer.
>
> THE COURT: All right. Well that's what we'll do then.
>
> MR. CAINE: All right.
>
> THE COURT: We'll stipulate there's a $327,000 debt secured by the second mortgage. That's plaintiff's Exhibit 1. And based upon that, this case can be dismissed without prejudice, and you can proceed up in the state of Idaho. All right.
>
> MR. CAINE: All right.

After discussion about the allowability of attorneys' fees, the discussion as to a personal judgment against Mr. Martineau comes up again on page 15 at line 6:

> MR CAINE: My client places something here I may be taking for granted. We're not -- we're not foreclosed from the possibility when we bring this action, obviously against -- on the mortgage in Idaho from raising that this is still a personal obligation to Mr. Martineau? You're not making that kind of determination?
>
> MR. KIPP: I don't understand what you just said.
>
> MR. CAINE: Well I don't either.
>
> THE COURT: Well, if that property -- if you foreclose on that property, I would think they are allowed -- if you foreclose, there's a sale, there's a deficiency, you get a deficieny [sic] judgment.
>
> MR. KIPP: Deficiency. They'll have a deficiency judgement against whomever are the makers, I guess, the testators or signers of the mortgage.
>
> THE COURT: I would think so. I think Leland Martineau, Charles Waters, Magic Valley Properties --
>
> MR. CAINE: That's it. That's our understanding.

(R. 165-169).

It is clear from this discourse that the parties did not enter a stipulation that personal judgment be entered against Lee Martineau but only recognized that there may be further judicial proceedings against the signatories on the mortgage <u>if</u> the sale of the property was insufficient to satisfy the debt. Mr. Caine himself recognized that the issue of Mr. Martineau's personal

liability was reserved and not precluded by the stipulation. The language establishes that the parties stipulated that the mortgage was valid; that it secured a debt of $327,000; and that Lee Martineau would not raise the lack of a promissory note as a defense to foreclosure. (A complete copy of the transcript of the Hearing on the Motion to Dismiss on September 3, 1985, is included in the Addendum as Exhibit "A").

The Minute Entry on the stipulation is consistent with this verbal stipulation reached in open court and is instructive for what it does not say. Pursuant to its terms, the court ordered that:

> 1. this case is hereby dismissed without prejudice;
>
> 2. the parties may proceed in the Idaho court;
>
> 3. no fees are allowed as to this case.

(R. 41). Nothing in this Minute Entry suggests the judgment was to be entered against Lee Martineau with a stay of execution pending foreclosure. The basis for this omission is the simple fact that Lee Martineau did not stipulate to such a judgment. (A copy of the Minute Entry is included in the Addendum as Exhibit "B").

This interpretation is further supported by the Joint Affidavit of Carman E. Kipp and William W. Barrett, counsel of record at the time the parties entered the stipulation. In describing the stipulation, Mr. Kipp and Mr. Barrett stated:

> 4. That as a result of the discussion, a stipulation was reached to the effect that a lawful mortgage existed that would be subject to foreclosure which proceeding would necessarily take place in Idaho as to the subject property and that the proceeds of the sale of the property would be applied to the balance which the mortgage secured.
>
> 5. That at no time was there ever any consideration of a judgment being entered nor was this contemplated in or covered by the stipulation.
>
> 6. That the document entitled 'Order and Judgment' dated October 11, 1985, signed by the Honorable Scott Daniels, District Court Judge, while it is entitled 'Order and Judgment' is in fact an order consistent with the record and the stipulation which are before the court and which are identified and discribed [sic] in this affidavit.
>
> 7. That the issues as to whether there would be a deficiency after application of the foreclosure proceeds, and as to whether Martineau was owed accounting and other fees by Strand, were not addressed and were reserved in the said Order.

(R. 350-351). (A copy of the Affidavit is included in the Addendum as Exhibit "C").

The confusion which the plaintiff seeks to use to its advantage only arises later when the order prepared by Mr. Caine was entered. It has no indication that it was mailed to Mr. Kipp for his approval pursuant to the rules. Plaintiff relies on Paragraph 3 of that Order to argue that personal judgment was entered against Lee Martineau. Paragraph 3 states:

> 3. That pursuant to Section 78-37-1 U.C.A. (as amended in 1953), that plaintiff are required to foreclose said mortgage against the property which is located in Cassia County, State of Idaho, before

> proceeding against the personal assets of the defendant Martineau.

(R. 51). If this paragraph is interpreted in a manner consistent with the oral stipulation reached by the parties in open court and on the record and in a manner consistent with the Minute Entry, then it can only grant plaintiff leave to proceed against Lee Martineau for a deficiency judgment after the Idaho property is sold. Even by its own terms, it does not say that plaintiff is awarded a personal judgment against Lee Martineau, execution of which is stayed pending foreclosure.

Finally, it must be pointed out that there are no findings of fact made by the lower court as a basis for amending the Order and treating it as a personal judgment. Instead, the Minute Entry and Order simply state that plaintiff's motion to amend the judgment is granted. Because there are disputed issues of fact, it was error not to make findings upon which to base the order. (R. 338, R. 380).

Based on the foregoing, the defendant objects to the plaintiff's remarks in its Statement of Facts implying that Lee Martineau acted intentionally to violate the October 1985 Order, especially the following two statements:

1. "In the Idaho action, Martineau raised numerous defenses in an attempt to defeat Judge Daniels' October 11, 1985 Order and Judgment." (See Respondent's Brief at page 10).

2. "More than two years after the entry of the Order and Judgment, after Martineau had thwarted all attempts of Nupetco to

foreclose on the Idaho property and fulfill the terms of the stipulation, Nupetco filed a Motion to Amend the Judgment to relieve Nupetco of the obligation to foreclose the Idaho property prior to pursuing Martineau on the judgment." (See Respondent's Brief at page 11).

The ultimate, overriding issue in this case is whether there is a legal and factual basis under which to impose personal liability on Leland Martineau. There is neither, and it was error to grant plaintiff's motion. The Order should be reversed and the issue remanded.

II

LELAND MARTINEAU HAS BEEN DAMAGED BY THE COURT'S FAILURE TO SET ASIDE THE ORIGINAL ORDER AND JUDGMENT IN THIS MATTER ON THE BASIS THAT STRAND AND MLK WERE NOT THE REAL PARTIES IN INTEREST

The plaintiff argues that there was no abuse of discretion in the Court's failure to set aside the stipulation and Order and Judgment of October, 1985 on the basis that Strand and MLK were not the real parties in interest.

The plaintiff first suggests that the substitution of Nupetco on April 26, 1989, somehow cures the fact that Strand and MLK had assigned the mortgage which was the subject matter of this suit to Nupetco on April 23, 1983--over three months prior to the filing of the complaint on August 2, 1983. Although plaintiff argues that Leland Martineau had notice of the assignment prior to entering the stipulation, Lee Martineau denies this allegation. Instead, he learned of the assignment

when Nupetco filed to foreclose on the real property in Idaho pursuant to the October order.

In addition, the sheer number of assignments in this matter by Strand and MLK to Nupetco must be noted. The mortgage which is the subject of this action was assigned on April 23, 1983 (R. 66). On both August 12, 1985 (R. 489) and October 7, 1988 (R. 584), the plaintiffs Mike Strand and MLK assigned all of their rights and claims in this lawsuit to Nupetco. On October 18, 1985, the plaintiffs assigned the Order and Judgment to Nupetco (R. 490). If we assume that the initial transfer in April of 1983 was effective, this action was prosecuted by a party who had assigned both the mortgage and claim to a third party entity. It is curious to note that while plaintiff argues that it was not error to allow Strand and MLK to proceed despite the assignment to Nupetco, the plaintiff also argues (for the purposes of precluding Lee Martineau's offsets and counterclaims) that an assignor may not utilize any claim that he has assigned for his own benefit. (See Brief of Nupetco pg. 37).

Lee Martineau was prejudiced by the failure of the real party in interest to pursue this action in two ways. First, allowing Strand and MLK to assert the claims alleged in their complaint after assignment but not allowing Lee Martineau to assert his offsets and counterclaims because of his assignment to the Hammons-Martineau Partnership is grossly inequitable. The stipulation itself reserved the issue of offsets and counterclaims.

Second, Lee Martineau was denied the full knowledge necessary to enter the stipulation at issue. It is entirely different to settle a case based on an oral contract between the parties to an action and to settle a case on an oral contract between one party and an assignee of the other. This is especially true where the oral contract is alleged to be secured by a mortgage on real property which would simply be invalid without a written note. As set forth in the case of Shaw v. Jeppson, 239 P.2d 745 (Utah 1952):

> The reason the defendant has the right to have a cause of action prosecuted by the real party in interest is . . . [to] permit the defendant to assert all defenses or counterclaims against the real owner of the cause.

Id. at 748.

Judgment has been entered against Lee Martineau without his consent and without trial on the issues, and he has been precluded from asserting his offsets and counterclaims which would have the effect of negating almost the entire amount of that judgment. This is especially egregious in light of his repeated efforts to have all parties and all issues consolidated and joined so as to economically and finally resolve the entire matter.

III

LELAND MARTINEAU IS ENTITLED TO ASSERT HIS OFFSETS AND COUNTERCLAIMS EVEN THOUGH HE ASSIGNED THEM TO THE HAMMONS-MARTINEAU PARTNERSHIP

Finally, plaintiff argues that it was not error to grant

plaintiff's motion for summary judgment precluding Lee Martineau from asserting his offsets and counterclaims based on his assignment of them to the Hammons-Martineau Partnership.

This issue was first raised by the plaintiff on the morning of trial on the offsets and counterclaims. The parties agreed to continue trial to allow each to submit memorandums on the issue of Lee Martineau's ability to assert his claims in light of his assignment of those claims to the Hammons-Martineau Partnership. The parties also agreed that the respective interests of the parties and assignees would "not be assigned, transferred or in any way altered." Instead, they would "remain static and identical from now down through trial." (Transcript pg. 4 beginning on R. 697).

In his memorandum, defendant Lee Martineau argued that, although his claims were now assigned to a partnership, that partnership had agreed and authorized him to assert those claims in this action. Because there was a stipulation not to disturb the status quo, Lee Martineau asked for leave of court to obtain such authorization. The request was denied, and summary judgment was entered against Lee Martineau. He was thereby precluded from asserting his offsets and counterclaims that each party had originally agreed to reserve.

In support of the lower court's dismissal, plaintiff argues on appeal that Lee Martineau does not own the offsets and claims. Because they are now partnership assets, plaintiff argues

Martineau cannot assert them for his personal benefit. To support this position, the plaintiff cites the companion cases of Moss v. Taylor, 273 P. 515 (Utah 1929) and Taylor v. Barker, 262 P. 266 (Utah 1927). However, plaintiff misinterprets Barker, and Moss is distinguishable. Under the facts of these companion cases, Mr. Waddoups and Mr. Taylor were in an automobile accident. Thereafter Waddoups assigned to his passenger, Grace Moss, any claim for damages to his car, and Moss brought suit against Taylor. However, in a separate and subsequent action, Taylor brought suit against Waddoups in the City Court, and judgment was entered for Taylor in that action. Waddoups appealed to the District Court and while trial de novo in that court was pending, judgment was entered in favor of Moss in the original action. Thereafter, Waddoups sought to use the Moss judgment to estop judgment in his case. Therefore, although Taylor v. Barker is cited by the plaintiff as supporting its position on assignment, the issue in Taylor v. Barker was whether there was an estoppel of judgment. As the Supreme Court of Utah itself stated:

> The sole question to be determined, therefore, is whether or not Ezra Waddoups is relieved of liability to answer to the claim made by H. L. Taylor for the alleged injury to the Taylor automobile because of the judgment secured by Grace A. Moss against Taylor.

Id. at 262, 267.

It was on this issue that the writer of the opinion failed to find authority for Waddoups' position and not on the position

of offsets as claimed by plaintiff. In addition, Moss v. Taylor is inapplicable as in that case Waddoups assigned his assets to a third person and private party. In the case at bar, Leland Martineau assigned his assets to an entity in which he has a 50% ownership interest. His use of those offsets and counterclaims is consistent with the partnership purposes, and it is the intent of the Hammons-Martineau Partnership that Lee Martineau be allowed to exercise control over these partnership assets and claim them in this matter.

On appeal, plaintiff also argues that Lee Martineau is precluded from asserting the offsets due to a lack of mutuality of obligation and on the basis that at least one of the claims arose after assignment by plaintiff of all claims to Nupetco.

As an initial matter, defendant wonders which assignment plaintiff seeks to use to establish this defense -- April 1983; August 1983; October 1985 or October 1988? Plaintiff's argument that defendant cannot assert claims which are subsequent to the pleadings is directly contradicted by Rule 13(d) of the Utah Rules of Civil Procedure. That Section states:

> (d) **Counterclaim maturing or acquired after pleading.** A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

As to plaintiff's argument as to mutuality of obligation, it is, quite frankly, irrelevant. Defendant Lee Martineau has authority from the partnership to assert the claims at issue,

including the Hammons judgment against Michael Strand. At all times there was mutuality of the offsets and counterclaims between the original parties, and plaintiff never raised this issue prior to the assignment to the partnership. In fact, plaintiff admits that the assignment to Nupetco was made subject to these claims and offsets. The assignment to the Hammons-Martineau Partnership does not negate this.

Finally, plaintiff also argues defendant cannot assert amounts owing to Martineau & Company on the basis that this entity is also a partnership. The plaintiff is simply in error, because Martineau & Company was originally a sole proprietorship of Leland Martineau. After he sold a 10% interest in the profits of the business to a business associate, he retained full ownership of all assets, including accounts receivable (R. 509).

Therefore, the lower court erred in precluding Leland Martineau from asserting his counterclaims and offsets or from joining all parties together in this action to resolve all issues in a judiciously expedient manner in the face of defendant's repeated requests to do so (See for example the Motion to Consolidate R. 343 and Affidavit of John C. Green R. 318) At the very least, the foregoing creates material issues of fact precluding summary judgment. Therefore, the Order granting plaintiff's motion and precluding the offsets and counterclaims should be reversed, and the issues remanded for trial on the merits.

CONCLUSION

The trial court erred in failing to set aside the Order and Judgment of October 11, 1985 on the basis that Mike Strand and MLK were not the real parties in interest; in granting plaintiff's motion for Summary Judgment to allow plaintiff to treat that Order as a personal judgment against Leland Martineau; and in granting plaintiff's Motion for Summary Judgment to preclude Leland Martineau from asserting his offsets and counterclaims. Each of these rulings should be reversed and the case remanded for a full trial on the issues.

Respectfully submitted this 9th day of March, 1990.

JOHN C. GREEN (USB #1242)
KIM M. LUHN (USB #5105)

DELIVERY CERTIFICATE

I hereby certify that on this 9th day of March, 1990, I caused to be hand delivered four copies of the foregoing Reply Brief of Appellant Leland Martineau to:

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I hereby certify that I caused to be mailed, postage prepaid, four copies of the foregoing Reply Brief of Appellant Leland Martineau to:

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ADDENDUM

Duplicate Copy

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

HONORABLE SCOTT DANIELS, JUDGE PRESIDING

* * *

MICHAEL W. STRAND and MLK INVESTMENTS, a Partnership,

Plaintiffs,

vs.

LELAND A. MARTINEAU, CHARLES WATERS, MAGIC VALLEY MOTORS, INC., and MAGIC VALLEY PROPERTIES, a Partnership,

Defendants.

Civil No. C83-5680

HEARING ON MOTION TO DISMISS

SEPTEMBER 3, 1985

EXHIBIT A

Reported By:

SUSAN S. SPROUSE, CSR/RPR

COPY

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P R O C E E D I N G S

THE COURT: We're proceeding in the case of Michael W. Strand and MLK Investments verses Martineau, C-83-5680.

I believe the first order of business is your motion, Mr. Barrett?

MR. BARRETT: Your Honor, we brought this before you this morning and discussed it briefly. The position that we've taken with respect to this matter is that we recognize the $100,000.00 at issue as to what the purpose and what the intent of that particular money was for and to be used for and hope it was what was to be received and returned for that. There's a balance owing for $327,989.25.

THE COURT: Plus interest.

MR. BARRETT: Plus interest. And if the second mortgage, which was Plaintiff's Exhibit No. 1, which is now before the court is the security for that amount of money under what has been termed by our Supreme Court, the single action statute and that would be Section 78-37-1 of the Utah Code and it's -- and the following statute Section 78-37-2, this statute in essence says, and I think you probably had the opportunity to read it, there can be-- quote, "There can be one action for the recovery of any debt or the enforcement of any rights secured solely by mortgage upon real estate, which action must be in

accordance with the provisions of this chapter."

In essence what this statute provides is that if you have a mortgage, that mortgage must be foreclosed, sold at a Sheriff's Sale. Then in the event there is a deficiency, that deficiency can be included as a judgement against the mortgage.

In this situation Mr. Strand has not chosen to foreclose on this second mortgage. He sued on what he has alleged is a debt. And it's our position that he just can't do that under some single action statute. That he has to first foreclose and be awarded a foreclosure judgement, and the property then must be sold. And then if there's a deficiency, he can go after Mr. Martineau or I suppose, any of the other people who may have an interest in the partnership for that deficiency.

I gave you a copy of one case which was Bank of Ephraim verses Davis. I found another case which is an older case, but the net effect is that this single action statute has been around for a long, long time. In fact, in Bank of Ephraim case cites a case as I recall that was decided back in 1898.

This other case that I have, which is First National Bank of Coalville verses Bowling, was an action where foreclosure action was filed by the First National Bank of Coalville and the defendants failed to answer the

complaint, and so the clerk entered a default judgement.

The mortgagor then filed a motion to quash a writ of attachment that had been issued subsequent to the entry of the default judgement. And the court, the lower court denied the motion to quash the writ of attachment, so writ of certiorari was requested of the Supreme Court. They took jurisdiction and reviewed the case. They cite the predecessors of 78-37-1 and 78-37-2 which are sections 104-55-1 and 104-55-2 of the revised statutes of Utah 1933 to compare the language. The language is essentially the same. It's been unchanged.

I think when they recodified, they changed the numbering system, but the statute as far as the language contained therein, has not been changed.

The court in taking a look at these two statutes that I refer to, you know, under Title 78 say this, and I quote, " We have held that under these sections, there is no personal liability by the mortgagor until after foreclosure sale of the security. And then and only for the deficiency remaining unpaid and that mortgagee may not have a personal judgement against the mortgagor until the security has first been exhausted"--"it has been first exhausted." I added an extra word there.

And I think that's the position we're taking here. There is no way that Mr. Strand is entitled to a

personal judgement against Mr. Martineau on this three hundred thousand dollar plus until he forecloses on that second mortgage and until that property is sold. And then if there's a deficiency, he'll have a judgement against him personally for the deficiency.

The Bank of Ephraim case essentially says the same thing. And it's our position that based on that, the amount prayed for, at least the difference between the hundred thousand and the three hundred thirty-seven thousand should be dismissed. He should not be entitled to pursue his claim on that basis.

THE COURT: Can I see the exhibit, the second one?

MR. CAINE: It's number 1.

THE COURT: What about the hundred thousand dollars, what's your position on it?

MR. BARRETT: I think the hundred thousand dollars, Your Honor, is in dispute. We don't -- Mr. Martineau's position is that was an investment. Mr. Strand was then made a partner in Magic Valley Properties and he was also given stock in Magic Valley Motors. So that was investment money.

We don't deny that there were subsequent monies made in excess of a hundred thousand dollars, and I think that's the money we're talking about in the second mortgage.

THE COURT: Well, but if I believe your client,

and I believe it was an investment, then he doesn't owe the hundred thousand dollars to Mr. Strand, right?

MR. BARRETT: That's right. That's right.

THE COURT: If I believe Mr. Strand's position that it was a loan, then he owes it. But your position is even though he owes it, he can't get it until he's exhausted the security. So you're moving to dismiss the entire action; is that right?

MR. BARRETT: If you are willing to buy that, Your Honor, yes, I think as we have discussed in chambers before, we recognize that we have a problem, at least as to the $100,000.00 because there are factual issues there.

As far as any subsequent loans that were made, I don't think we're disputing that. I don't think we're disputing the amount alleged in the complaint. And obviously, if you were to believe that the hundred thousand was a loan, then this case is over. And if you believe that, there are some problems with respect to that hundred thousand, and you want to hear more evidence, then at least as to that, I don't think you can do anything.

But I think as far as the balance owing -- I suppose the dilemma you are faced with is that you can either rule now and throw the whole thing out if you choose that approach, or you can take this under advisement, hear the evidence on the hundred thousand dollars and make your

decision based on that.

THE COURT: How could I possibly consistently throw out the three hundred twenty seven dollar lawsuit saying they have to exhaust their security first without also dismissing the hundred thousand dollars? I don't see how I can consistently because a diversion of the facts wouldn't lend itself to that result, it seems to me.

MR. KIPP: Your Honor, I think that goes a little beyond what the briefing was done, and I apologize for also speaking, but that part of it I think is in my area of this case. And the answer is we think we're entitled to win as a matter of law on whatever amount is covered by the mortgage. If the hundred is not covered by the mortgage, they can't beat us on the hundred because it's an investment that we don't owe him. I think --

THE COURT: That's --

MR. KIPP: I think that's what you said.

THE COURT: Yeah.

MR. KIPP: Either it's a loan, the whole thing is a loan, in which you handle by the government of the law which he says here on it or it's not a loan and therefore not a lien, the hundred.

THE COURT: Okay. Mr. Caine.

MR. CAINE: The court now has the document in front of it that I'll be referring to.

If it please the court, I have a number of, I suppose, responses to this, I think, that needs to be said.

Number one, I think first of all to some extent it addresses the timeliness of bringing this motion on the day of the trial. This matter has been pending for two years; the complaint as Mr. Kipp indicated, a little earlier when we talked about some additional checking found has not been amended in any way, form and the allegations have not changed.

And so then on the morning of the trial, we now have the defendant coming forward claiming "Well, you didn't foreclose the mortgage, so you're barred." I think the court needs a little bit of background as to what has gone on in this case before you can make a decision.

I will make a proffer of some testimony that I have. Dan Jackson, who is an attorney at law here in Salt Lake City, is here to give, if we need to, and that was these parties did, in fact, initiate a lawsuit to foreclose this second mortgage in the State of Idaho prior to this suit being initiated here. That suit was dismissed based upon, really, a sipulation of all the parties wherein it was determined that under Idaho law, this second mortgage in fact really isn't a mortgage because there's no underlying note and could not be foreclosed.

The court obviously understands that to

foreclose--so the court is clear, the property we're talking about foreclosing is in Burley, Cassia County, Idaho. So foreclosure against real property couldn't lye here. It would have to go as an action in rem.

So they tried to do that. The case was dismissed up there on the basis in effect that all the parties recognized that under Idaho law, this mortgage was defective because there's no underlying note. Also, it may very well be defective on its face under our law or any other law when you have a comment saying "This is to secure indebtedness between the parties in varying amounts in excess of $200,000.00." It's not clear to me whether that's a sum certain and can obviously be attacked in our own jurisdiction.

So there's some question to the validity of this mortgage to begin with. And I submit we have not plead either the validity or invalidity of this document as a mortgage in this case, but very simply produced this as a piece of evidence indicating, if you will, as an admission against interest, against Mr. Martineau, that the debt we're talking about here is a loan. Just like we have introduced checks which have the word "loan" on them. Just like we introduced other documentation in Mr. Martineau's own handwriting which indicate a loan. That's part of the case demonstrating a loan.

Under that extent, this is not being treated

as a mortgage per se, but is evidence indicating an admission against the interest he has in this case or his claim, at least, that this, that this is simply an investment.

In addition, the case that's been quoted here, and I think the court needs to carefully look at that Ephraim verses Davis, is distinguishable to some extent on its face, but I think the basic proposition here is correct, and I don't dispute that.

This is a case where counsel for the bank went in on a prejudgement sort of a situation before he had done anything, before he foreclosed against the security and before he filed a suit against the individuals, personally attempted to attach personal property of the defendant on the basis that it was about to be removed and all that sort of thing. The court is familiar with how that is done.

Then there was a motion to quash that prejudgement writ of attachment. The court in the Supreme Court said it should have been quashed in effect because they didn't go ahead and foreclose against the mortgage, saying in effect that 78-37-1, which is the mortgage foreclosure rule in this state, really goes to the issue of where you go to get satisfaction and where you go if there is a valid mortgage; is that you, in fact, must sell the securities secured by the mortgage, the real estate before you look to

a deficiency.

So you really are talking in this case about judgement types of remedies. And I have no -- and I have no argument with the fact that if, in fact, we got a judgement in this case against Mr. Martineau or foregone his interest in this property up there, the first thing we'd have to do is go up and try to foreclose against that property based upon a judgement here before we could go after his personal assets. And I think that's exactly what this case-- we have to do --

THE COURT: You think you can get a personal judgement against someone even though there's a mortgage, so long as you don't execute on the judgement until you foreclose the mortgage?

MR. CAINE: Yes. I think that case allows that. Secondly --

THE COURT: That's not --

MR. CAINE: Secondly, I think in a situation we have in this case that there was an attempt to foreclose on the mortgage, and if -- if counsel for Mr. Martineau is now saying in this proceeding and are willing to stipulate that, in fact, there is a $327,000.00 debt, that's evidence-- even though there's not a promissory note, there is a debt that is secured by that note -- or secured by that mortgage, excuse me, and willing to stipulate to that, that's fine.

We'll stop right now and go up to Idaho.

MR. KIPP: We accept it.

THE COURT: All right. That settles the case.

MR. CAINE: You stipulate that that is secured by that property?

MR. KIPP: We accept it. We accept that proffer.

THE COURT: All right. Well, that's what we'll do then.

MR. CAINE: All right.

THE COURT: We'll stipulate there's a $327,000.00 debt secured by the second mortgage. That's Plaintiff's Exhibit 1. And based upon that, this case can be dismissed without prejudice, and you can proceed up in the state of Idaho. All right.

MR. CAINE: All right.

MR. KIPP: Your Honor, I should be sure that we're clear about some of the sideline stuff of that. I don't have their complaint before me. In Idaho the complaint-- and I must say, I don't share counsel's view about that this becomes unimportant at this point. In Idaho they sought attorney fees. I think they do not seek attorney fees here. If they do, they are not entitled to them.

MR. CAINE: Well --

MR. KIPP: And they ought to be clear on the record.

MR. CAINE: Let me clarify one thing for the court. Obviously, our -- we're not changing our position that the total claim in this case is $427,000.00 and I understand--

MR. KIPP: I understand that reserves $100,000.00 dispute.

MR. CAINE: Okay. If they are willing to stipulate that there's not going to be an issue in Idaho, that there's no underlying note, and that the mortgage doesn't secure a debt and that the amount they are willing to stipulate to is $327,000.00, okay.

THE COURT: It seems to me the question of attorney fees is something you are talking about in Idaho.

MR. KIPP: Yes. I just don't want attorney fees granted here. That's not part of our stipulation. There's nothing in this record, nor is there anything before the court that empowers them to collect attorney fees in this dispute. I don't know what the Idaho law about foreclosure-- whatever the law up there --

MR. CAINE: It allows for attorney fees.

THE COURT: Right. As to this case, C-83-5680, it will be dismissed without prejudice, no attorney fees awarded; is that right?

MR. CAINE: That's what I think he said.

MR. KIPP: That's correct.

MR. CAINE: Okay.

THE COURT: All right. Then you'll prepare an Order to that effect?

MR. CAINE: Yes, I will.

THE COURT: Submit it to Mr. Kipp for approval pursuant to Rule 2.9?

MR. CAINE: My client places something here I may be taking for granted. We're not -- we're not foreclosed from the possibility when we bring this action, obviously against -- on the mortgage in Idaho from raising that this is still a personal obligation to Mr. Martineau? You're not making that kind of determination?

MR. KIPP: I don't understand what you just said.

MR. CAINE: Well, I don't either.

THE COURT: Well, if that property -- if you foreclose on that property, I would think they are allowed-- if you foreclose, there's a sale, there's a deficiency, you get a deficiency judgement.

MR. KIPP: Deficiency. They'll have a deficiency judgement against whomever are the makers, I guess, the testators or signers of the mortgage.

THE COURT: I would think so. I think Leland Martineau, Charles Waters, Magic Valley Properties --

MR. CAINE: That's it. That's our understanding.

MR. KIPP: The rights that those give to them

as against parties exist, it's available, the mortgage, the amount which is agreed, subject to provisions of Idaho law, they can proceed to foreclosure.

MR. CAINE: All right. I'll draw the Order, then.

THE COURT: Thank you. Court will be in recess.

(Whereupon the proceedings were concluded.)

C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Susan S. Sprouse, do hereby certify that I am a Certified Shorthand Reporter and Notary Public in and for the State of Utah;

That as such Reporter, I attended the hearing of the foregoing matter and thateat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting, and the foregoing pages constitute a full, true, and correct report of the same.

DATED at Salt Lake City, Utah, this 16th day of September, 1985.

Susan S. Sprouse

Susan S. Sprouse, CSR/RPR

My Commission Expires:

November 1985

FILMED

County of Salt Lake - State of Utah

FILE NO. C-83-5680

TITLE: (✓ PARTIES PRESENT)	COUNSEL: (✓ COUNSEL PRESENT)
Michael W Strand	J Cain
vs	
Leland Mortensen	C. Kipp

L. Busch — CLERK

S. Sprouse — REPORTER

J. Foster — BAILIFF

HON. Scott Daniels — JUDGE

DATE. Sept. 3, 1985

This case comes on now regularly before the Court for trial, plaintiff appearing in person and being represented by J Cain as counsel, the defendant also appearing in person and being represented by C Kipp as counsel.

Michael W Strand is sworn and examined on his own behalf. Documentary proof is offered and received on behalf of the plaintiff + the defendant.

Based upon oral stipulation of respective counsel, Court orders the following

1) this case is hereby dismissed without prejudice;

2) the parties may proceed in the Idaho Courts;

3) no fees are allowed as to this case.

JUDGE

EXHIBIT B

CARMAN E. KIPP A1829
WILLIAM W. BARRETT
KIPP AND CHRISTIAN, P.C.
ATTORNEYS AT LAW
CITY CENTRE I, #330
175 EAST 400 SOUTH
SALT LAKE CITY, UTAH 84111-2314
(801) 521-3773

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MICHAEL W. STRAND and MLK INVESTMENTS, a Partnership, Plaintiffs, vs. LELAND A. MARTINEAU, CHARLES WATERS, MAGIC VALLEY MOTORS, INC., and MAGIC VALLEY PROPERTIIES, a Partnership, Defendants.	JOINT AFFIDAVIT OF CARMAN E. KIPP & WILLIAM W. BARRETT Civil NO.: C83-5680 Judge Scott Daniels

Affiants being first duly sworn, depose and say:

1. That they were counsel of record for Leland A. Martineau prior to and at the time of the hearing in this cause on September 3, 1985.

EXHIBIT C

2. That they were not counsel for any of the other parties and that that fact was disclosed of record and to the Court.

3. That after the presentation of the evidence and testimony by plaintiff, the Court entertained a Motion made on behalf of defendant Martineau by affiant William W. Barrett during the course of which discussion ensued as reflected by the attached transcript.

4. That as a result of the discussion, a stipulation was reached to the effect that a lawful mortgage existed that would be subject to foreclosure which proceeding would necessarily take place in Idaho as to the subject property and that the proceeds of the sale of the property would be applied to the balance which the mortgage secured.

5. That at no time was there ever any consideration of a judgment being entered nor was this contemplated in or covered by the stipulation.

6. That the document entitled "Order and Judgment" dated October 11, 1985, signed by the Honorable Scott Daniels, District Court Judge, while it is entitled "Order and Judgment"

PP AND CHRISTIAN PC
ATTORNEYS AT LAW
CITY CENTRE I, #300
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SALT LAKE CITY,
UTAH 84111-2314
(801) 521 3773

is in fact an Order consistent with the record and the stipulation which are before the Court and which are identified and discribed in this affidavit.

7. That the issues as to whether there would be a deficiency after application of the foreclosure proceeds, and as to whether Martineau was owed accounting and other fees by Strand, were not addressed and were reserved in the said Order.

Further affiants sayth not.

KIPP AND CHRISTIAN, P. C.

Carman E. Kipp

William W. Barrett

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this 25th day of November, 1987.

Notary Public
Residing at Weber County, Utah

My Commission Expires:

11/29/90

AND CHRISTIAN, PC
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